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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WENDY CHOWNING, individually and on behalf of all others similarly situated, Plaintiffs, v. KOHL'S DEPARTMENT STORES, INC., a Delaware Corporation; KOHL'S CORPORATION; and DOES 1 through 20, inclusive, Defendants.	CASE NO. 2:15-cv-8673-RGK-SP **CLASS ACTION** PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS DISCOVERY MATTER Date: January 26, 2016 Time: 9:30 a.m. Courtroom: 3 or 4 – 3rd Floor Magistrate Judge: Sheri Pym Discovery Cut-Off: None Set Trial Date: None Set Pre-Trial Conference Date: None Set

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This Supplemental Memorandum is submitted pursuant to the Court's ordered dated January 11, 2016.

Plaintiff alleges that Kohl's violates California law by using false and misleading price comparisons for its private and exclusive branded products. The case is pleaded as a class action on behalf of California consumers who purchased private or exclusive branded products from Kohl's at a stated discount of 30% or more. For all intents and purposes, this case is materially indistinguishable from another false price-comparison case that was recently certified in this district. *See Spann v. JCPenney Corp.*, 307 F.R.D. 508 (C.D. Cal. 2015) (certifying class based on the same claims). *See also, Spann v. JCPenney Corp.*, No. SA CV 12-0215 FMO(RNBx), 2015 WL 1526559 (C.D. Cal. Mar. 23, 2015) (denying defendant's motion for summary judgment and holding, based on evidence submitted, that Plaintiff may pursue a variety of different measures of restitution and/or damages at trial). Notably, two of Plaintiff's counsel herein are also class counsel in *Spann*, and they seek in this case to obtain the same types of evidence used to certify a class and defeat summary judgment in *Spann*.

By order of the Court, Plaintiff must file her motion for class certification by February 2, 2016. Dkt. No. 29. To complicate matters, counsel for Kohl's notified Plaintiff's counsel on January 14, 2016 that Kohl's intends to promptly file a motion for summary judgment on either January 22, or January 25, 2016. *See* Ex. 1 (Email correspondence between counsel). Therein, Kohl's intends to argue, in part, that Plaintiff has no evidence to show her entitlement to restitution. *Id.* Plaintiff's counsel responded that such a motion would be premature, in part, because Kohl's has not yet produced all the sales data and other documentation that would be used to oppose this argument, and because Plaintiff's expert will need time to process and analyze the data once it is produced. *Id.* Plaintiff's counsel also noted that the timing of Defendant's summary judgment motion would force Plaintiff's counsel to oppose this potentially dispositive motion by February 1, 2016, which is just *one day* before their motion for class certification is due. Plaintiff's counsel submits that this schedule is unreasonable given that: 1) counsel are traveling to Milwaukee, Wisconsin this week for the depositions of three Kohl's employees; 2) Kohl's still has not produced the majority of documents that it promised to produce; 3) the parties have a discovery dispute that will not be heard until January 26, 2016; 4) once Kohl's completes its document production, Plaintiff's counsel and her expert(s) will need time to analyze the document production (including the sales data), and it will take additional time and effort to prepare both a motion for class certification and opposition to summary judgment. *Id.* Accordingly, Plaintiff's counsel requested that the parties enter into a reasonable briefing schedule on the summary judgment motion that takes all these facts into consideration. *Id.* To date, counsel for Kohl's has refused. *Id.*

It is against this backdrop that Plaintiff seeks a prompt production of documents from Kohl's. On December 28, 2015, Plaintiff proposed, at least temporarily, to drastically reduce the scope of her document request in order to significantly reduce the time and effort for Kohl's to comply. *See* Stiefel Decl., [Dkt. No. 36] at 11, ¶11. Specifically, Plaintiff proposed that Kohl's temporarily limit its production for each document request category to those documents that relate to private or exclusive branded products purchased by Plaintiff at a discount of 30% or more (the "Chowning proposal"). Kohl's responded that it could not, without undue burden, identify which of Plaintiff's purchases involve products within the class definition (*See* Exhibit 2 (Dkt. No. 36-9)), so Plaintiff clarified that she would limit her requests (temporarily) to just the two items identified in her original complaint, plus two more qualifying items that she had identified from receipts that she had previously produced to Kohl's.[1] The parties have gone back and forth on this proposal, and other offers to compromise, but it was not until January 14 and 15, 2016 that Kohl's provided its final response to Plaintiff's proposals as reflected in the parties' Joint Stipulation filed on January 15, 2016. *See* Dkt. No. 42.

At this point, the current discovery dispute has effectively been reduced to two issues. First, Kohl's has committed to produce most of the documents that Plaintiff has requested via the meet and confer process, but its "rolling" production continues to be slow and defective. To be sure, Kohl's has produced some documents, but approximately half of the production to date consists of copies of print advertisements (RFP No. 3)[2]; and it is difficult to determine what other categories have been produced. Based on a preliminary examination, it appears that Kohl's has not yet produced any documents related to some categories of documents, including but not limited to, in-store advertising (RFP No. 5), rotation plans (RFP No. 13), projection analyses (Request No. 17), bestseller sheets (RFP No. 19), enterprise planning documents (RFP No. 21), and pricing forms (or PLU sheets) (Request Nos. 25 and 29). Kohl's counsel has stated that Kohl's produced documents relating to establishing plans (RFP No. 15) and LP Querry data (RFP No. 27), but it appears such production is incomplete. . *See* Exhibit 3. Kohl's has only completed a partial production of almost every other document category, such as documents showing the advertised regular or original prices for two (rather than four) items purchased by Plaintiff (RFP No. 8); purchase orders for two (rather than four) items purchased by Plaintiff (RFP No. 12); audit documents for one or possibly two (rather than four) items (RFP No. 23); and finally, comprehensive

[1] These two additional purchases are now referenced in Plaintiff's First Amended Complaint filed today. Dkt. No. 44 at ¶¶ 32-33.

[2] Kohl's produced more documents at 9:00 pm on January 19, 2016 while counsel are in Milwaukee, Wisconsin preparing to take three (3) depositions, and we have not yet had time to analysis and evaluate the documents produced. Kohl's made an additional production at 1:18 p.m. on January 20, 2016, the date this supplemental brief will be filed.

sales data for two (rather than four) products purchased by Plaintiff (RFP No. 31).[3]

In addition to being an incomplete production, many of the documents produced are not decipherable (complicated by the fact that Kohl's has not identified the Request to which each document is responsive). At a deposition on January 20, 2016 (the date of filing this brief), Kohl's head of the pricing compliance office that performs price audits was not able to explain many audit-related documents and/or state how they relate to Plaintiff's purchases. Moreover, Kohl's has produced documents that appear to show sales transaction data for the same product but each spreadsheet contains different transaction data for the same dates. *See* Exhibit 4. For example, Bates Stamped documents 496 and 517 appear to show sales transaction data for the J-Lo Dress with Style No. JL614411, but each spreadsheet contains different transaction data for the same dates. Furthermore, some of the documents that Kohl's has produced in "Tiff" format are not completely legible; and some of the data, such as the sales transaction data for one item, appear to be either incomplete and/or comingled with unresponsive data. In sum, Kohl's suggest that it has produced a lot of documents, but the production is far from complete at this juncture and the outstanding information sought by Plaintiff extends far past the single item Kohl's references in its supplemental brief.

The second remaining dispute concerns Request No. 2, in which Plaintiff requests all research, studies, analysis, reports or surveys concerning retail prices, discounts, sale prices or price comparison advertising in Kohl's possession. This request is highly relevant to some of the central issues in this case, including whether Kohl's "Regular" prices and price comparison advertising are material and/or "likely to deceive" a reasonable consumer. *Spann*, 307 F.R.D. at 521 (citing cases). *See also id*. at 518 (listing common questions as "whether defendant's

[3] Again, even the documents produced appear to be incomplete or missing relevant data concerning the products to which they relate.

advertisements were likely to deceive a reasonable consumer; [and] whether defendant's statements regarding its pricing were material to plaintiff's purchasing decisions. . ."). To date, Kohl's has only agreed to produce (and has produced) focus group research pertaining to California consumers. However, it refuses to produce other responsive documents based on its argument that such evidence is not limited to California consumers. Meanwhile, Plaintiff believes, and Kohl's does not dispute that it is unilaterally withholding many more responsive documents, including but not limited to customer surveys that directly deal with the material issues in this case. Kohl's has not cited, and Plaintiff is unaware of any authority suggesting that the "reasonable consumer" standard is limited to consumers in one particular state (i.e., California), and given the broad definition of "relevance" under the Federal Rules, Plaintiff believes that Kohl's should be ordered to produce *all* responsive documents in its possession, custody or control.

Respectfully submitted,

Dated: January 20, 2016 **FRANTZ LAW GROUP, APLC**

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